INDEX

		Page
I	OPINIONS BELOW	2
II	QUESTIONS PRESENTED	2
III	CONSTITUTIONAL PROVISIONS INVOLVED	3
IV	STATEMENT OF THE CASE	4
V	REASONS FOR DENYING WRIT	21
VI	CONCLUSION	49
VII	CERTIFICATE OF SERVICE	50

TABLE OF CASES AND AUTHORITIES CITED

Case	Page
Ardn't v. Prose, 94 So.2d 818 (1957)	6, 35, 41
Avery v. Heermance, 138 So.2d 775 (1962)	6, 23, 24
Bachman v. Mejias, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N. E. 2d 866 (1956)	6, 24
Crane v. Hayes, 253 So.2d 435 (1971)	7, 24, 42
Day v. Nelson, 213 So.2d 491 (1968)	42
Erhardt v. Erhardt, 27 A.D.2d 734, 277 N.Y.S.2d 734 (1967)	25
Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943)	6, 38, 39, 41
Foster v. Sharpe, 114 So.2d 373 (1959)	6, 23
Fox v. Fox, 179 So.2d 103 (1965)	6, 22
Gilman v. Morgan, 158 Fla. 605, 29 So.2d 372	26, 29

TABLE OF CASES AND AUTHORITIES CITED (cont.)

Case	Page
Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930)	6, 42
McKinney v. Weeks, 130 So.2d 310 (1961)	7, 40
May v. Anderson, 345 U.S. 528, 73 S.Ct. 840 (1953)	22, 25, 26, 29, 32
Mirras v. Mirras, 202 So.2d 887 (1967)	6, 22, 23, 25, 26, 29
Neal v. State, 135 So.2d 891 (1961)	29
New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947)	6, 22, 23, 29, 32
Painter v. Bannister, 258 Iowa 1390, 149 N.W.2d 152, cert.den. 385 U.S. 949	27, 33, 44
People v. Jane D. Edwards & Spence Chapin, 23 N.Y.2d 925, 298 N.E.2d 508	21, 27
People ex rel. Stone v. Maglio, S.Ct. 1970, 308 N.Y.S.2d 604	27

TABLE OF CASES AND AUTHORITIES CITED (cont.)

Case	Page
Powell v. Powell, 242 So.2d 138 (1970)	6
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	47
Robertson v. Bass, 52 Fla. 420, 42 So. 243	7, 24, 42
Skeen v. Marx, 105 So.2d 517 (1958)	27
State ex rel. Fox v. Webster, 151 So.2d 14 (1963)	6, 22, 26, 28, 29
State ex rel. Hicks v. Cain, 160 Fla. 680, 36 So.2d 275 (1948)	42
State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935)	6, 42, 44
United States v. Johnston, 268 U.S. 220, 45 S.Ct. 496 (1925)	47
Vermeulen's Petition, In re, 114 So.2d 192 (1959)	45
Weiner v. Weiner, S. Ct. N.Y. Co. 1956, 149 N.Y.S.2d 362	25

TABLE OF CASES AND AUTHORITIES CITED (cont.)

Case	Page
Williams v. North Carolina, 325 U.S. 226	22, 25
Witt v. Burford, 84 Fla. 201, 93 So. 186 (1922)	6, 7, 42
Annot., 35 A.L.R.3d 520, 561	6
Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev., 345, 352	6, 24
15 Fla.Jur., *Habeas Corpus* §62	41
Foster, *Revocation of Consent to Adoption: A Covenant Running With the Child?*, N.Y. Law Journal, Vol. 166, §26 (Aug. 6, 1971)	21
28 U.S.C. §1738	23
Stumberg, *The Status of Children in the Conflict of Laws*, U.Chic.L.Rev. 42 (1940)	23
Restatement (Second) of Conflict of Laws §79	24
R. Leflar, *American Conflicts Law* (1968)	24
Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 Ed)	31, 32
Constitution of the United States Article IV, Section 1	3

In the Supreme Court of the United States

OCTOBER TERM 1972

No. 72-349

OLGA SCARPETTA,

Petitioner,

vs.

NICK F. DEMARTINO and JEAN DEMARTINO,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

The respondents here were the successful respondents in the Florida courts, at all stages, in a child custody habeas corpus proceeding.

The petitioner was the unsuccessful petitioner in the Florida courts.

This brief is filed by the respondents in opposition to a petition for a writ of certiorari to the Florida Supreme Court, heretofore filed in this court.

I

OPINIONS BELOW

The decision of the Supreme Court of Florida without opinion, is reported at 262 So.2d 442 (Appendix A to Petition). The opinion of the District Court of Appeal of Florida, Third District (Appendix B to Petition) is reported at 254 So.2d 813. The decision and judgment of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, is unreported (Appendix C, Appendix C-1 to Petition).

II

QUESTIONS PRESENTED

The respondents here *restate* the real issues involved as follows:

1. ARE THE FLORIDA COURTS REQUIRED TO AFFORD FULL FAITH AND CREDIT TO A CUSTODY DECREE OF A NEW YORK COURT, ESPECIALLY WHERE, AS HERE, CIRCUMSTANCES HAVE CHANGED SINCE THE NEW YORK DECREE WAS RENDERED; THE ISSUE OF THE INFANT'S BEST WELFARE WAS NOT MEANINGFULLY LITIGATED IN THE PRIOR LITIGATION; THE FOSTER-PARENTS, RESPONDENTS HERE, WERE NOT BEFORE THE NEW YORK COURT; AND THE PETITIONERS BELOW WAIVED ANY CONTENTION THAT FULL FAITH AND CREDIT APPLIED?

2. WERE ANY CONCEPTS OF DUE PROCESS VIOLATED BY THE FLORIDA PROCEDURE EMPLOYED HERE WHERE A FULL HEARING ON THE BEST INTERESTS AND WELFARE OF THE CHILD WAS HAD, AND ISSUES FULLY WERE LITIGATED WITH ALL INTERESTED PARTIES BEFORE THE COURT; AND WHERE NO SUCH CONSTITUTIONAL ARGUMENTS WERE RAISED BELOW AT ANY TIME?

3. WILL WRIT OF CERTIORARI BE GRANTED WHERE NO SPECIAL REASONS AS CONTEMPLATED BY RULE 19 EXIST; AND THE MATTER INVOLVES A DETERMINATION OF THE CHILD'S BEST WELFARE ON UNIQUE FACTS, ON AN EXTENSIVE RECORD, IN A UNIQUE "EPISODIC" CASE?

III

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner claims that the following constitutional provisions are involved:

Constitution of the United States, Article IV, Section 1.

"Full faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Con-

> gress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Constitution of the United States, Amendment XIV, Section 1.

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV

STATEMENT OF THE CASE

The petitioner has stated the case in an inappropriate light. The determination in Florida was predicated upon a full evidentiary hearing—with all parties before the court. Accordingly the respondents restate the underlying facts here, in detail.

The Dade County Circuit Court determined that the best interests and welfare of the child, born out of wedlock, dictated that she remain in the custody of the respondents—with whom she had lived continuously since shortly after her birth. The judgment of the trial court was entered after an extensive hearing, and upon consideration of a mass of testimony, expert and otherwise, and documentary evidence (Appendix to petition, 5a-6a).

The Third District Court of Appeal of Florida affirmed, finding—with good reason—substantial competent evidence in support of the trial court's decision regarding the best welfare of the infant. The court applied well-established sound principles of law regarding full faith and credit, comity, changed conditions, and welfare of the infant. The affirmance involved simply a factual evaluation on a unique record, and application of established rules of law from which there was no semblance of departure (254 So.2 813; Appendix B).

In affirming the trial court, the Florida Third District held:

> Olga Scarpetta filed a petition for writ of habeas corpus against Nick F. and Jean DeMartino alleging they had illegal custody of her minor child, Lenore, and she prayed for custody of Lenore. Appropriate pleadings were filed and a hearing held. The parties appeared, testimony was taken, and the petition was thereafter denied. She has appealed.
>
> This appears to be one of those tragic situations in which one of two innocent parties must suffer. We do not attempt to assess fault or blame to either party.

C.T.—Conformed Transcript of portions of Record on Appeal in Third District furnished by Petitioner to Florida Supreme Court and lodged in Supreme Court under Florida procedure.

R.T.—Conformed Transcript of Respondent in Florida Supreme Court.

Note: All emphasis supplied.

We have carefully reviewed the record and briefs prepared by able counsel. *The parties agree that a child custody order of a sister state is not entitled to full faith and credit but may be given great weight under the doctrine of comity.* See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947); Powell v. Powell, Fla.App. 1971, 242 So.2d 138; Mirras v. Mirras, Fla.App. 1967, 202 So.2d 887; Fox v. Fox, Fla.App. 1965, 179 So.2d 103; State ex rel Fox v. Webster, Fla.App. 1963, 151 So.2d 14; Avery v. Heermance, Fla.App. 1962, 138 So.2d 775; Foster v. Sharpe, Fla.App. 1959, 114 So.2d 373; Bachman v. Mejias, 1 N.Y. 2d 575, 154 N.Y.S. 2d 903, 136 N.E. 2d 866 (1956); Annot., 35 A.L.R. 3d 520, 561; and Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Review, 345, 352 (1953).

We have and do give great weight and respect to the orders of sister states but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm his ruling. See Arnd't v. Prose, Fla. 1957, 94 So.2d 818; Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943); State ex-rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935); Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930); Witt v. Burford,

84 Fla. 201, 93 So. 186 (1922); McKinney v. Weeks, Fla.App. 1961, 130 So.2d 810; and 15 Fla.Jur. Habeas Corpus §62.

The order appealed herein is therefore, Affirmed. (R. T. 1-2)

In denying rehearing with supplemental opinion, the court said further:

> Appellant has filed a vigorous and well reasoned petition for rehearing.
>
> We point out that the *change in circumstances* and passage of time giving rise to the relationship between the baby, Lenore, and the DeMartinos occurred in great part because of appellant's consent, through her New York attorneys, that the custody of Lenore remain with the DeMartinos during the pendency of certain New York legal proceedings.
>
> The petition for rehearing, having been considered, is denied. See Robertson v. Bass, Fla. 1906, 52 Fla. 420, 42 So. 243; and Crane v. Hayes, Fla. 1971, 253 So.2d 435, opinion #40,832, filed September 29, 1971.

The Florida Supreme Court simply denied certiorari. (262 So.2d 442)

There was a full hearing in the trial court on the child's best interest and welfare here. The Florida Courts ruled as they did based upon the unique *evidence adduced.*

The decisions in the trial court and Third District clearly reflect that the trial court found on the *evidence adduced* that circumstances and conditions with regard to the child's welfare had changed materially and substantially since the New York State trial proceedings to which the respondents here were not parties anyway; and that therefore, although "*great weight*" was given to the New York custody order still

> *under the circumstances of this case . . . the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees (respondents). There is sufficient competent evidence in the record on appeal to affirm his ruling.* [citing cases].

The supplemental opinion clearly points out that there was "a change in circumstances and passage of time," since the New York proceedings which was not attributable to the respondents.

Thus it is clear that the decisions below were based on a factual evaluation of the trial proceedings and evidence.

THE TRIAL PROCEEDINGS

1. *Evidence Presented* — The record reveals the following: The habeas corpus proceeding was instituted by Olga Scarpetta, the natural mother of the illegitimate infant, Baby Lenore (A. 47(a)). The petitioner-mother gave birth to the child out of wedlock in New York on

May 18, 1970. A few days thereafter, she surrendered the infant to a fine, well-established New York adoption agency, Spence-Chapin.

On June 1, 1970, after repeated counseling sessions during pregnancy, and after full opportunity to change her mind subsequent to the birth of the child, Miss Scarpetta signed and executed a sworn surrender of the child with the view toward ultimate adoption by suitable parents. There had been fourteen visits with the Spence-Chapin social worker during pregnancy at which time adoption and its ramifications were discussed. Miss Scarpetta had numerous alternatives available to her but chose not to turn her baby over to the father or her family, or even to tell her family at that time. There had been a visit by Miss Scarpetta to the agency on May 29, 1970, at which time she had intended to sign the surrender but did not do so; and was advised to think it over, and finally the June 1, 1970 visit, when she voluntarily and openly executed the surrender.

Thereafter, on June 18, 1970, pursuant to the surrender document, custody was given to the foster parents, Nick and Jean DeMartino, for eventual adoption. The adoptive father is a New York attorney, and a religious, highly intelligent and responsible citizen; and an outstanding husband and father. In the same vein, the mother, Jean, is an intelligent, highly competent, sensitive, calm, fulltime housewife and mother. (R.T. 2-9; 10; 11-25).

By contrast, with no personal reflection upon Olga Scarpetta, the petitioner, her circumstances are quite different. She lives in an apartment in New York City and works full time for a living. She is not an American

citizen and her family resides permanently in South America. The father of the child is a South American citizen from Bogota and is married and the parent of children of his marriage (C.T. 102-106; 108-109; 111-112).

Miss Scarpetta is not presently engaged, nor does she have any immediate plans to marry (R.T. 21).

If custody were awarded to her, Miss Scarpetta would leave the child each work day, all day long, in the hands of a 65 year old, non-English speaking friend from South America, who would serve as a full time baby-sitter in the New York apartment (R.T. 22-23).

The child would not have the desirable guidance and moral support and comfort of a father, nor a normal family life and home. She would be brought up in a New York City apartment (R.T. 24-25; 26-27).

The DeMartinos have another adopted child, Linda, now age 4. Lenore, now well over 2 years old, and over a year old at the time of the trial herein, knows only the respondents as her parents, and Linda as her sister and these are the only parents and family she has ever known. She has formed close, healthy, warm familial and emotional ties with the respondents, obviously, and with her "sister" and with the DeMartino relatives (R.T. 28-34).

The proof at the trial overwhelmingly and convincingly demonstrated that a forced separation of Baby Lenore from her family at this juncture would be devastating to her from a psychiatric, psychological and medical point of view. The testimony was presented by numerous eminently qualified experts and, indeed, two world recognized authorities (R.T. 35-36; 11).

In all events, toward the end of June, Miss Scarpetta changed her mind about the adoption. She claimed that she called the agency on June 18, 1970, to inform them of her decision although the social worker at the agency said that the agency first received a call from a hospital social worker on June 23, 1970, on behalf of Miss Scarpetta, indicating a change of mind. Certainly the hospital worker was contacted on June 23, 1970 and an appointment was set up with the agency for June 29, 1970 or June 30, 1970, at which time Miss Scarpetta formally said she had changed her mind about the adoption and asked for the return of Lenore—now living with the DeMartinos. She was told that the baby had been placed for adoption, and advised to go for further counseling.

The petitioner ultimately went to a lawyer and on August 3, 1970 executed a letter seeking the return of the child. The baby, of course, was living with the DeMartinos, and her ties were increasing by leaps and bounds.

2. *Proof of Proceedings in New York Courts*—On September 21, 1970, Miss Scarpetta brought a habeas corpus proceeding in New York. The agency, and only the agency, was named as a respondent (C.T. 88). She sought the return of the child. A trial was had on November 2, 1970 (C.T. 101). At the trial in New York the only witnesses who testified were the petitioner, the agency social worker, and two agency representatives who testified on Spence-Chapin policy (C.T. 101-132). Not an iota of testimony was presented as to the effects the transfer might have on Lenore, then 5½ months of age. There simply was *no* meaningful adversary proceeding. The only inquiry was into circumstances surrounding the surrender, and the attempt and efforts to revoke, and the then-condition of Miss Scarpetta. And, of course, the DeMartinos

were not made parties, or served under the vagaries of the New York adoption law, nor called as witnesses, nor given any opportunity to be heard or to cross-examine or confront anyone.

Miss Scarpetta prevailed—as between her and the agency. She was allowed to revoke the surrender and the writ was sustained by judgment dated November 20, 1970 (C.T. 5-7). At this time, Baby Lenore was just 6 months of age, living with the DeMartinos. Her attachment to them continued to grow. Spence-Chapin appealed to the Appellate Division, First Department, and the decision was affirmed on January 28, 1971. Pending the appeal, a stay which had been incorporated into the judgment of the trial court was in full force and effect. The stay was entered upon the stipulation of *Miss Scarpetta* and the Spence-Chapin Agency (C.T. 146; 85-87). The DeMartinos were not parties to the appeal nor did they secure the stay (C.T. 3). At the time of the Appellate Division affirmance (C.T. 69-70), Baby Lenore, needless to say, was with her family, the DeMartinos, and now was over 8 months old. Her emotional and psychiatric and psychological attachments continued to grow.

Thereafter, the Spence-Chapin agency appealed, upon permission granted, to the New York Court of Appeals. The order granting permission contained a show cause order and stay (C.T. 73-74). The DeMartinos were not parties to the appeal and did not secure the stay. The argument was held on March 1, 1971, and the matter was affirmed on April 1, 1971. The remittitur of the New York Court of Appeals issued on April 7, 1971. Now "Baby Lenore" was over 10½ months old, living lawfully still with the DeMartinos (C.T. 41-55; 59).

So until April 7, 1971, and indeed subsequent thereto, a stay was in full force and effect; the agency-respondent (and, of course, the DeMartinos) *was not* required to give up the child and lawful custody of Baby Lenore remained with the DeMartinos.

On April 28, 1971, the New York trial court signed an exparte order, directing the *DeMartinos* to turn the baby over to the petitioner, upon remand of the cause. The return date was May 3, 1971 (C.T. 16). The Court of Appeals remittitur had not even contained the names of the DeMartinos.

In the meantime, the DeMartinos filed an action in the United States District Court, Southern District of New York, for declaratory decree and injunction against enforcement of the New York state orders. They claimed their civil rights and constitutional rights were denied because they were not permitted to intervene or to be heard in state court and due process was violated. A stay of New York court proceedings was in effect on May 3, 1971, in this action (R.T. 37). The complaint was dismissed and injunction denied *because* the Federal Court ruled that the remedy of the DeMartinos—who claimed violation of due process—was by way of appeal to the United States Supreme Court from the decision of the New York Court of Appeals. (R.T. 38).[1]

As a matter of fact, the DeMartinos sought to intervene in the state trial court in late November and sought to intervene in the Appellate Division and the

[1]A stay pending appeal was denied in the Second Cicuit Court of Appeals, but a stay was granted to and including May 5, 1971, to afford the opportunity to obtain a stay in the United States Supreme Court.

Court of Appeals. All applications were denied (R.T. 39-40; 41-42). The Court of Appeals directly ruled in its opinion that the DeMartinos had no right to intervene under the vagaries of the New York adoption law.

In the meantime, prior to service upon them of *any* papers whatsoever and upon repeated refusals to permit them to intervene, the DeMartinos moved to Florida and established their residence here with their children. Jean and the children came here early in April and Nick came in early May.

On May 27, 1971, the New York trial court entered an order purportedly holding the DeMartinos in contempt but they were long since in Florida and never were served with any process—obviously. There was *no* hearing on the contempt order and no service ever of the May 3 turnover order or any other order on the DeMartinos—who were never even afforded the opportunity to be heard in New York.

As a matter of fact, Jean DeMartino never even knew that Olga Scarpetta had instituted habeas corpus proceedings in New York against the agency until two or three days before Thanksgiving of 1970, after the New York trial court already had ruled (R.T. 43-44). The DeMartinos were not even called as witnesses and, until the Florida hearing of June 22, 1971, they had not been permitted to appear in *any* court to present testimony on the best interest of "Baby Lenore". Mr. DeMartino was advised of the Scarpetta New York petition on or about the hearing date but was advised not to tell Jean.

As of early May 1971, when stays in the New York litigation still existed, "Baby Lenore" was just under one year old. She was living happily and lawfully with her family—her parents, or rather the only parents she had ever known, and her sister.

After the DeMartinos publicly announced their presence and residence in Florida, Olga Scarpetta filed a petition for a writ of habeas corpus in the Circuit Court, Dade County, on June 10, 1971, alleging illegal detention of Lenore (C.T. 4-5). The DeMartinos filed their written return telling in detail their version of events and asking for continued custody in the best interest of Lenore; and asserting that a turn-over of the child would be harmful to the baby medically (C.T. 6-11).

A hearing was had on June 11, 1971, and Judge Cullen, after a full and thorough legal argument, ruled that testimony on the best interests and welfare of Baby Lenore would be appropriate.

Trial was set and conducted on June 22, 1971 (R.T. 45). The best interest and welfare of Baby Lenore were fully explored. Only then, upon a full exploration of the welfare of *Lenore*—not that of the contending parties—was the decision below reached—and adhered to after a full argument on petition for rehearing, and the decision was confirmed on an exhaustive journey through the Florida Appellate process.

Because the medical, psychiatric and psychological testimony is so clear, overwhelming and compelling, and not discussed at *all* in the petition, the salient features of that testimony are outlined here.

3. *Expert Testimony*

a). *Dr. Hirst W. Libo*

Dr. Libo, eminently qualified, was the New York pediatrician for the DeMartino children. Lenore was somewhat withdrawn on June 19, 1970, but then her development commenced. The DeMartinos were excellent parents, clam, logical and reasonable. There was a natural empathy between Lenore and Jean DeMartino.

At trial, Lenore was thirteen months old. The circumstances of Lenore's custody were recited, and Dr. Libo unequivocally testified that at this "particular critical time in her development" it would be one of the "worst things" which could occur if Lenore were taken from the DeMartinos and given back to the biological mother (R.T. 47).

According to the doctor, pediatric opinion was in agreement: the child should remain with the people who have cared for it through this "very critical and formative period of her life" and that 13 months is a critical period in child adjustment and personality development. The child can be "severely damaged if the child is removed from the mother figure" (R.T. 47-48).

Simply stated, the doctor said: "At this particular point in this child's emotional development it would be wrong to take this child away from its mother." (R.T. 49).

If the child were returned to Miss Scarpetta at age 5½ months, it would have been at the edge of time when

permanent scars would result; it would have been bad but the risk would be less than for such a transfer at critical age of thirteen months.

The damage to a thirteen-month-old and to a child taken away thereafter, at ages three or four, would be similar to losing parents and "having your guts ripped out and you don't have any sense you can survive without them" (R.T. 57). This is a "time-anchored" slot in psychological development process (R.T. 57).

c) *Dr. Richard Toister*

Dr. Toister is a well-qualified child-psychologist and pediatrician. He teaches at University of Miami Medical School, and has offices at Mailman Center for Child Development. He performed psychometric tests on Lenore and the DeMartinos. Lenore was normal in all respects and developing normally. The DeMartinos were bright, verbal, intelligent and well-integrated in personality without disorder. They were bright parents.

In Dr. Toister's opinion, a transfer of custody would be "detrimental" to the child at this "critical" period of adjustment (R.T. 58-59) The period of 6 months of age to 2 or 2½ years of age is particularly critical for stable attachments (R.T. 59). "Any separation from the mother figure, the motor parent, would be detrimental to the child's future development." (R.T. 59)

A transfer at five months still could have caused permanent damage; the critical period begins at a range of perhaps 3 months to 6 or 7 months.

The recognized significant period is 6 months to two or two and one-half years. To a reasonable medical certainty, the transfer now would cause stress which could lead to permanent problems. There is a probability of detrimental effects (R.T. 60).

d) *Dr. Ben Sheppard*

Dr. Sheppard is a well known Miami pediatrician and psychiatrist, who has spent a lifetime dealing with children's problems. He said: "It's my very considered opinion that the best interest of this child would be served by permitting her to remain with the present adoptive parents." (R.T. 61-62).

The formative months are five or six to eighteen. A transfer "would be traumatic", "might lead to chronic illness, and certainly might leave scars . . ." (R.T. 62, 63). The opinion was based on reasonable medical probability (R.T. 63).

The doctor said that he "would even go a little stronger" in stating that there might be permanent damage; and that in view of the odds—"we can't play games with this child's future". The danger of transfer at five months would still be present but probably not as much as at six months (R.T. 64-65).

e) *Dr. Carolyn Rabinowitz*

This child psychologist teaches at the University of Miami and also is connected with the Mailman Child Development Center. She said, with reference to the welfare of Baby Lenore:

"The basic thing for Baby Lenore at this age is not to be separated from the DeMartinos, the only parents she has known." (R.T. 66-67).

• • •

"For the child to be separated from the mother at this time is the equivalent of death to the child. The loss of the mother is something the child cannot comprehend." (R.T. 67-68).

The child responds in various ways: he may become apathetic and gain or lose weight. He may become withdrawn and depressed, sleepless, irritable, and psychosomatic. He may regress in walking and talking. In any event, he has no way of coping with what is—as to it—a death situation.

Separation at this time, from the DeMartinos, involves a "severe risk" and "it's a risk" that the witness "for one, would never be willing to endorse or undertake". There would be a "high likelihood" of "severe consequences". And the effects would not be overcome in a matter of months.

This was a "specific medical opinion". Transfer of custody from the mother figure "would be very bad for the child". (R.T. 69-71)

f) *Dr. Stella Chess*

This lady is a renowed child psychiatrist, teacher, writer, scholar, and one of the world leaders in the field—nor more and no less. She actually examined the DeMartinos, at her own decision, prior to testifying (R.T. 35, 11).

Lenore was developing normally and related to strangers well—with Jean DeMartino as her base. She had obvious affectionate ties to her family and sister—whom she imitated (R.T. 13-20).

In the opinion of this authority, under the circumstances here:

> "I do not think it would be in the best interests of the child to move her." (R.T. 18)

Such a change may be made only under the most dire circumstances "because of the evidence of personality distortion" which results (R.T. 19).

Movement is "critical" at this age and a happily flourishing child should not be transferred. To a reasonable medical certainty, movement would result in the probability of harm to Lenore based on past experiences in similar cases (R.T. 72-73).

Movement at five months or five and one-half months would not be best but at thirteen months, transfer from the parent figure would be particularly bad.[2]

Olga Scarpetta appealed and, of course, did not prevail. Affirmance was based on the facts.[3] (Appendix B to petition). The Florida Supreme Court denied certiorari. The petition by the natural mother followed.

---

[2]Against authorities like these, the petitioner produced one-non-medical doctor, non-teacher, child psychologist who said transfer of custody at 13 months of age to Miss Scarpetta would result in no permanent problems. He recognized the authority—as must anyone—of Stella Chess (R.T. 35, 11).

[3]Constant reference is made to the so-called absolute right of the mother to revoke her consent and surrender under New York law, and the DeMartinos awareness of this possibility. As a matter of fact, New

V

REASONS FOR DENYING WRIT

I. FLORIDA COURTS NOT REQUIRED TO AFFORD FULL FAITH AND CREDIT TO CUSTODY DECREE OF NEW YORK COURT, ESPECIALLY WHERE, AS HERE, CIRCUMSTANCES HAVE CHANGED SINCE THE NEW YORK DECREE WAS RENDERED; THE ISSUE OF THE INFANT'S BEST WELFARE WAS NOT MEANINGFULLY LITIGATED IN THE PRIOR LITIGATION; THE FOSTER-PARENTS, RESPONDENTS HERE, WERE NOT BEFORE THE NEW YORK COURT; AND THE PETITIONER BELOW WAIVED ANY CONTENTION THAT FULL FAITH AND CREDIT APPLIED.

York's statutory scheme has not been heretofore interpreted judicially as permitting such a revocation in an agency adoption situation; See FOSTER, DEVOCATION OF CONSENT TO ADOPTION: A COVENANT RUNNING WITH THE CHILD? New York Law Journal, Vol. 166, #26 (Aug. 6, 1971). This is different from a private placement with no counseling. The six month period is to determine the mother's fitness. Prior cases in New York cited by Professor Foster show the distinction. To make matters even more confusing, in 1969 the Court of Appeals reached a conclusion basically opposite to the one here: PEOPLE v. JANE D. EDWARDS AND SPENCE CHAPIN, 23 N.Y.2d 925, 298 N.E.2d 508, on revocation. How then, can it seriously be urged that the respondents were chargeable with knowledge of a revocation? Even the New York courts had no such knowledge before this case. The DeMartinos were never told of the possibility of legal action when they first took the baby.

1. *Full Faith and Credit Not Required Here*

Nothing is more solidly established in the constitutional jurisprudence than that custody orders, entered in proceedings in other states, are not entitled to full faith and credit in subsequent proceedings brought in Florida. This is particularly true where, as here, circumstances have changed; one of the essential contending parties in Florida was not even before the court in the foreign jurisdiction; and the crucial issue of the child's best interests was not even litigated in the prior proceedings in any *meaningful* way. *New York* ex. rel. *Halvey v. Halvey*, 330 U.S. 610, 613-27 (1942); *May v. Anderson*, 345 U.S. 528; see also, *Williams v. North Carolina*, 325 U.S. 226, 229.

It is clearly established that custody orders and decrees of foreign jurisdictions are not final judgments entitled to full faith and credit in this state where the conditions are markedly different now in the Florida proceeding than they were when the orders were entered in the foreign jurisdiction. *New York ex. rel. Halvey v. Halvey*, supra.

The appellate courts of Florida, in accordance with the controlling decisions of this court, repeatedly have stated that decrees involving the custody of children, entered in other states are not automatically binding under constitutional edicts of full faith and credit. See Florida cases collected in Annotation, 35 *A.L.R.* 3*d* at p. 561. There can be no question but that this is the rule. State ex rel. *Fox v. Webster* (1963, Fla. App.) 151 So.2d 14, cert. den. 379 U.S. 822, 13 L.Ed2d 33, 35 S. Ct. 45; *Fox v. Fox* (1965, Fla.App.) 179 So.2d 103; *Mirras v.*

Mirras (1967, Fla. App.) 202 So.2d 887; *Avery v. Heermance* (1962, Fla.App.) 138 So.2d 775; *Foster v. Sharpe* (1959, Fla.App.) 114 So.2d 373.

Custody awards simply do not have the attributes of a final judgment entitled to full faith and credit under the Constitution of the United States, Article IV, §1; or 28 U.S.C. §1738. Where welfare of the child is a consideration, like it is in Florida, then an adjudication by another court at another time simply does not bind Florida courts. Custody is never final; see *Stumberg, The Status of Children in The Conflict of Laws*, *U.Chi.L. Rev. 42, 56-57 (1940).

And certainly where new facts arise subsequent to the hearing in the other state, full faith and credit cannot conceivably be a bar to a full determination on the merits in this state; see *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 613 (1947). Here, the medical testimony unequivocally shows that subsequent to the time that Miss Scarpetta obtained her order against the *adoption agency*, and while the DeMartinos still lawfully retained custody of the child under appellate procedures and New York state procedures, pursuant to the *stipulation* of Miss Scarpetta, and the agency, and a series of stays, while the DeMartinos were striving to obtain their right to be heard, a medical situation arose, and still exists, which would render a turnover of the child to Miss Scarpetta physically, emotionally and psycholigically harmful to Lenore.

On this issue, the Florida Appellate Court squarely held:

"We point out that the change in circumstances and passage of time giving rise to the relationship between the baby, Lenore, and the DeMartinos occurred in great part because of appellant's consent, through her New York attorneys, that the custody of Lenore remain with the DeMartinos during the pendency of certain New York legal proceedings.

"The petition for rehearing, having been considered, is denied. See *Robertson v. Bass*, Fla. 1906, 52 Fla. 420, 42 So. 243; and *Crane v. Hayes*, Fla. 1971, 253 So.2d 435."

(Appendix B to Petition)

Indeed, even the absence of changed conditions, the courts, including New York, simply do not feel themselves bound by full faith and credit to accept the provisions of a foreign custody decree; the welfare of the child at the time is the primary consideration. *Bachman v. Mejias*, 1 N.Y. 2d 575, 154 N.Y.S. 2d 903, 136 N.E. 2d 866; *Restatement (Second) of Conflict of Laws*, §79, comment c, page 234; *R. Leflar, American Conflicts Law* (1968) 588-590; Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L.Rev. 345, 352.

The New York Court of Appeals has taken the unequivocal position that full faith and credit does not apply to custody decrees since the state's duty as "parens patriae," to determine the child's best interest, is primary; *Bachman v. Mejias*, 1 N.Y. 2d 575, 136 N.E. 2d 903, It would indeed be a strange commentary on the process of law if Florida were to afford full faith and credit to

New York orders of this kind where New York would not even reciprocate if the situation were reversed, and indeed, specifically and repeatedly has refused to afford to Florida decrees any recognition whatsoever; *Erhardt v. Erhardt*, 2d Dept. 1967, 27 A.D. 2d 734, 277 N.Y.S. 2d 734; *Weiner v. Weiner*, S.Ct., N.Y. Co. 1956, 149 N.Y.S. 2d 362.

The welfare of a child is primary and decrees concerned with the custody of a child are in the words of Mr. Justice Frankfurter, subject to examination anew at any time. That Justice has stated that the exception to full faith and credit exists in the case of custody decrees because "the child's welfare in a custody case has such a claim upon the state that the responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time." *May v. Anderson*, 345 U.S. 528, 536 (concurring opinion).

On top of this, the DeMartinos were not permitted to intervene in the New York proceedings and thus their claim to custody is in no wise barred in Florida by any claim of full faith and credit; "full faith and credit" applies only where the litigating parties were *both* before the court in the prior litigation; and that court had personal and subject matter jurisdiction. This is the undisputed and undisputable law; *May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840; the original court rendering judgment had no jurisdiction of the parties as well as the subject matter. See *Williams v. North Carolina*, 325 U.S. 226, 229; *Mirras v. Mirras*, Fla.App. 1967, 202 So.2d 887.

As we have seen the DeMartinos were not permitted to be heard in New York. Under the Florida rulings persons in the status of these respondents are entitled to a full hearing on the best interests of the child under Florida law and any court readily would award continuing custody to them on those interests. In short, for many, many reasons, the New York orders were meaningless at the time of the hearing in Florida, where the DeMartinos were for the first time, before the court.

More importantly the interests of Lenore never were properly, meaningfully and fully litigated in New York and those orders are predicated upon a fiction: that the best interest of the child necessarily rests with the natural mother. No meaningful testimony was taken in the New York proceedings regarding the surroundings of Lenore in the DeMartino home, nor was there any medical testimony concerning her best welfare and the effect on Lenore of her being separated from the only parents and family she had ever known, even at that time. Thus, full faith and credit simply does not apply; because there was a void of a meaningful, full adversary hearing with the participation of the DeMartinos, on the child's best welfare. Absent the DeMartinos, *May v. Anderson*, supra; and absent even a semblance of a fully adversary "welfare" hearing in New York, the doctrine of full faith and credit has no place here. *May v. Anderson* supra; *State ex rel. Fox v. Webster*, supra. *Mirras v. Mirras*, Fla.App. 1967, 202 So.2d 887 [squarely so holding]; *Gilman v. Morgan*, 158 Fla. 605, 29 So.2d 372 ["The question of the best interest of the child not having been litigated in a fully adversary manner in the foreign state, its decree would not be recognized or given effect by the Florida court."]

So strange indeed are the anamolies here, under the New York law, that the left hand of the New York Court of Appeals apparently does not know what the right hand is doing. In a case exactly like this one, in 1969, involving the same agency, the court held that the attempt to withdraw a consent would not be countenanced, *People ex rel. Doe v. Jane D. Edwards* and *Spence-Chapin*, 23 N.Y. 2d 925, 298 N.E. 2d 508 (child's best interests governs); accord: *People ex rel. Stone v. Maglio*, St.Ct. 1970, 308 N.Y.S. 2d 604. These cases actually reflect the Florida rule and policy — which rejects the withdrawal of consents in situations like this, *Skeen v. Marx*, *Fla.App.* 1958, 105 So.2d 517, and does not permit the child to be treated like a chattel at the whim, caprice and changing emotional needs of the natural mother.

The child's *present* interest is paramount, *Painter v. Bannister*, 258 Iowa 1390, 140 N.W. 2d 152, cert. den., 385 U.S. 949. The interest is unfettered by full faith and credit concepts.

2. *Doctrine of Unclean Hands Inapplicable*

The fact that the petitioner urges that the DeMartinos came to Florida in alleged contravention of New York orders did not and does not change the duty of Florida courts to determine the best interests of the child. The "clean hands" doctrine argument is misplaced. To begin with, the DeMartinos were not even parties in the New York litigation under the strange aspects of that law and yet the petitioner now contends that they are personally bound by it.

But in the second place Florida is committed to the following rule: When jurisdiction vests in a custody case like this one, the court has a duty to determine from the evidence where the minor child should be placed for its own best interest. The court should not refuse to exercise jurisdiction or be deterred in the discharge of its duty by what it might be convinced is the bad faith of a contending party in removing the child from a sister state in violation of court order. A foreign decree involving the issue of custody is required to give way to a Florida decree based on the best interests and welfare of the minor child. Custody decrees of sister states are not final within the meaning of full faith and credit. They may be modified from time to time according to the best interests and welfare of the child. It is the duty of the court to base its determination of where the custody of the child should reside on its own best interests and welfare and not on the good faith or bad faith of the parties; nor upon the violation of foreign court orders if any there be. These principles were pronounced by Dade County Circuit Court and were affirmed by the Third District Court of Appeal in *State ex rel. Fox v. Webster*, Fla.App. 1963, 151 So.2d 14; and this court denied a petition for a writ of certiorari addressed to that decision, 379 U.S. 822, 85 S.Ct. 45.

The United States Supreme Court has recognized clearly the doctrine — in turn clearly recognized in Florida — that full faith and credit in no event need be afforded to foreign orders of the type involved here. And the United States Supreme Court likewise has denied certiorari directed to a holding that this is true notwithstanding apparent violations of court orders by an actual contending party who removes the child from one state to another.

Here, of course, the DeMartinos were not even contending parties, and moved to Florida prior to service of any order on them, and their position is much stronger than that of the respondent in *Webster*, supra. They could not be in contempt of a court which they were not before, and which obtained no service or jurisdiction over them. Full faith and credit is not involved here.

3. *Comity Discretionary—No Abuse Shown*

The same considerations that obviously preclude application of full faith and credit here preclude even the dignity of comity being afforded to the New York orders. See *State of New York ex rel. Halvey v. Halvey*, supra; *May v. Anderson*, supra. Comity is a discretionary matter and where as here there was no full adversary hearing on the best interests of the child in New York, and the DeMartinos were not given the opportunity to be heard; *Mirras v. Mirras*, supra; *Gilman v. Morgan*, supra, 29 So.2d 372; *State ex rel. Fox v. Webster*, supra, 151 So.2d 14, 16-17; cf., *Neal v. State*, Fla.App. 1961, 135 So.2d 891, 894-895 (recognizing rule; parties must be before court); and where conditions since the New York hearing have changed markedly, since at this juncture the child would be devastated by a sudden, traumatic transfer to a perfect stranger, comity is no consideration; Florida repeatedly has said that the rights of a natural parent are not absolute. They have paid more than lip service to this rule. The child is a ward of the court and Florida is now parens patriae. Even a simple analysis of the evidence and testimony presented here shows convincingly, clearly and beyond dispute that not only does the welfare of the child dictate continued custody in the DeMartinos, but that the sudden, traumatic transfer, wresting Lenore

away from the only parents and the only family she has ever known would have far-reaching effects on her present and future well-being.

4. *Full Faith and Credit Issue Not Preserved Anyhow*

The petitioner conceded at the trial and on appeal that the issue involved here was *not* one of full faith and credit — but rather was one of discretionary comity. Having lost the battle of comity, the petitioner — who already waived the Constitutional issue, sought to resurrect it.

Indeed, the Third District Court of Appeal specifically noted in its opinion of affirmance, that:

> "The parties agree that a child custody order of a sister state is not entitled to full faith and credit but may be given great weight under the doctrine of comity. . . .
>
> We have and do give great weight and respect to the orders of sister states, but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm this ruling. . . . " (Appendix B)

Indeed, the petition itself, and the exhibits demonstrate that the issue of "full faith and credit," if it ever

were involved, was not preserved for review here (See Petition pp. 10-13).

The original habeas corpus petition in Dade County Circuit Court never *mentioned* "full faith and credit" (Appendix N.) The return and answer claimed that for a mass of reasons, "full faith and credit" was inapplicable (Appendix O).

At the trial and on appeal to the Third District Court of Appeal — as shown by the opinion there — the petitioner claimed simply that the ordinary rule of comity applied here and that "full faith and credit" need not be given to the New York custody decree (See Appendix B to Petition pp. 4a-5a; see also Appendix P).

Indeed, the petitioner points to its appellate brief in the Florida Appellate Court in an effort to show that it preserved the constitutional issue (See Petition, pg. 10; Appendix P., pg 58(a)). The brief clearly demonstrates that far from relying upon the "full faith and credit clause," the petitioner actually conceded its inapplicability to "this judgment of a sister state" relating to the custody of a minor child, and chose to rely upon the *discretionary* doctrine of comity (Appendix P., pp. 58(a)-60(a).

Thus, even assuming that the brief could be relied upon to show that the question timely was raised — which it can't, see, *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* [1951 Ed.], § 79 and cases cited — the brief actually reflects the non-preservation and waiver of the issue.

In the brief, some reference was made to a state concept of res judicata (Appendix P; page 60a); and on petition for rehearing in the Third District (Appendix Q) the petitioner sought belatedly to rely on full faith and credit — too late with too little, and also sought to rely on comity.

Finally, the petition to the Florida Supreme Court, cited in the Appendix, once again does not squarely raise the issue. It simply recites the holding of the Appellate Court revealing that the "parties agree that a child custody order of a sister state is not entitled to full faith and credit, but may be given great weight under the doctrine of comity." (Appendix R., page 65(a)).

At various crucial times then, the petitioner not only waived the question of full faith and credit, but affirmatively restated its non-applicability. The petitioner never distinguished the New York custody decree from custody decrees involving disputes between natural parents, as she attempts to do in this petition, for the first time, to escape the effects of *May v. Anderson*, supra; and *State of New York, ex rel. Halvey v. Halvey*, supra. She has conceded that the New York decree was simply a custody decree involving a minor child, and that "full faith and credit" thus is inapplicable.

Efforts now to treat the New York decree differently, so as to bring into play the "full faith and credit clause" come too late; *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* [1951 Ed.], §§ 65-82, and cases cited.

So much for the "full faith and credit" clause argument.

II. NO VIOLATION OF DUE PROCESS SHOWN IN FLORIDA PROCEDURE; FULL HEARING ON BEST INTERESTS AND WELFARE OF CHILD WAS HAD AND ISSUES FULLY WERE LITIGATED WITH ALL INTERESTED PARTIES BEFORE THE COURT; NO SUCH CONSTITUTIONAL ARGUMENTS WERE RAISED BELOW AT ANY TIME IN ANY EVENT.

1. *Due Process Afforded to Petitioner*

The petitioner urges in reality that the best interest of the child is automatically subservient to her rights as natural mother of the illegitimate child, and that she somehow automatically was deprived of due process here, in a custody dispute which resulted in continued custody in the foster parents.

In a very similar situation, in *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert.den., 385 U.S. 949, the Iowa Court ruled that the best interest of the child there involved dictated that the custody remain with grandparents in the Mid-West.

The father — like the mother here — had voluntarily surrendered custody to the grandparents after his wife died. After the passage of time, he remarried and sought to regain custody.

His environment was somewhat "Bohemian". The grandparents were possessed of solid values and lifestyle. There was testimony by experts — as here — that transfer of the child's custody back to the father would be harmful.

The Iowa courts awarded custody — in the best interest of the child — to the grandparents, notwithstanding the natural right of the natural parent, because the child's welfare was the main consideration. Great value was afforded the expert testimony. The analogies between *Painter* and this case need hardly be further described.

This Court denied a petition for a writ of certiorari, 358 U.S. 949, in *Painter*. There is no more reason to grant the petition here.

No due process clause violation, or any other constitutional violation can be demonstrated by a decision based on the child's best interest and welfare, as opposed to the rights of the natural parent, no matter how strong those rights are in the abstract. The child's welfare is supreme. This always has been and will be the law regardless of the identity of the contestants.

2. *Florida Procedure Affords Full Hearing on All Issues in Cases Like This; Right of Natural Parent Given Great Weight, But Falls to Best Interest of Child — No Violation of Due Process.*

Under the law of Florida, the child's welfare is the crucial issue in a child-custody habeas corpus proceeding between the natural mother of an illegitimate child and the foster parents. Since this is so, the evidence and record below virtually mandated that custody continue in the DeMartinos, and the writ properly was discharged, the petition denied, and custody remanded to the DeMartinos — *as they sought in their return.*

The Petition for a writ of habeas corpus alleges illegal detention of the child against the desires of the natural mother. It does not even suggest that the child's welfare requires custody in her. As a matter of fact, the crucial issue, as raised by the Return and Response was not the mere wishes of the mother, but rather the "best welfare" of the child. This was the issue tried below in the Florida Court.

Here of course the DeMartinos legally secured custody of the child in the first instance. That custody was summarily determined — as to them — in New York, without any semblance of opportunity to be heard; and without any meaningful adversary trial on any issue, let alone the welfare of the child.

The law of Florida is well defined, clear, and not subject to dispute, despite the contrary argument in the petition (page 22). In a situation such as this the DeMartinos had to be afforded a full opportunity to develop what was best for the child and certainly the Florida courts repeatedly have so held.

The leading case directly applicable here, cited below, (Appendix B), is *Arnd't v. Prose*, Fla. 1957, 94 So.2d 818. The case is strikingly similar to this one. It was a habeas corpus case in which — just like Miss Scarpetta here — the natural mother attempted to obtain custody of her illegitimate child. And just like Miss Scarpetta here, the mother alleged that she was the natural mother of the child and that the respondents were unlawfully holding him.

The facts revealed that the natural mother had voluntarily turned custody of the child over to the father's sister. The father of the child, at the mother's request, placed custody of the child with his sister and her husband. The foster parents had no actual legal claim to the child in any technical sense. That was just like the situation here.

Sometime later the natural mother instituted habeas corpus proceedings. *The trial judge refused to hear any evidence on the best welfare of the child and held that since the foster parents had no legal right to the custody of the child and the natural mother had such a right, it had no alternative but to remand the child to the custody of his mother.*

The Florida Supreme Court reversed and in an opinion by Justice Roberts, directly applicable here, said:

> At the hearing on the writ and the answer thereto, the trial judge refused to hear any evidence on the question of the welfare of the child or his desires in the matter, it being his view that since Mr. and Mrs. Arnd't's answer had shown no legal right to the custody of the child and since the appellee, as his natural mother, had a clear legal right to his custody, he had no alternative but to remand the child to the custody of his mother. He did so, and Mr. and Mrs. Arnd't have appealed.
>
> We think the learned trial judge overlooked the holding of this court in Maddox v. Barr, 49 Fla. 182, 38 So. 766, that in a habeas corpus proceeding involving the custody of a child 'the law is not

so much concerned about the illegality of the detention as the welfare of the child*** It was further said as to such proceedings that

'The court, when asked to restore an infant, is not bound by any mere legal right of a parent or guardian but is to give it due weight as a claim founded on human nature, and generally equitable and just. The court is in no case bound to deliver a child into the custody of any claimant, but should, in the exercise of a sound judicial discretion, after a careful consideration of the facts, leave it in such custody as the welfare of the child at the time appears to require.'

This rule has been followed in other cases involving the claim of a parent or legal custodian to the custody of a child as against the claims of third persons.

* * *

Accordingly, the order remanding the child to the custody of the appellee must be reversed under the authority of the above cited cases, and the cause is remanded for further proceedings.

Reversed and remanded. (94 So.2d at 819)

That case and language govern these proceedings like a glove. Consideration of the best interests of the child at a hearing obviously supported the order of continuing custody in the DeMartinos and the discharge and denial of the habeas corpus proceedings, and the affirmance below.

But there are Florida cases even closer. In *Fielding v. Highsmith*, 152 Fla. 887, 13 So.2d 208, also cited below, an adoption proceeding was ruled invalid *because consent was not procured from the natural parent nor was notice given him of the adoption proceedings.*

On habeas corpus, the father challenged the adoption; and the trial court found that he was fit and proper as a father and awarded him the custody of the child.

On appeal the Florida Supreme Court reversed. The court held that although the adoption was invalid as a matter of law, nevertheless the foster parents who were absolute strangers to the blood, were entitled to possession in the best interests of the child on the entire record and facts presented. After holding the adoption invalid as a matter of law, the court said, in part controlling here, the following:

> It does not necessarily follow from this holding, however, that the custody of the child must go back to the father in all events. This is a habeas corpus proceeding brought primarily to determine the custody of a minor child, even though in the process the validity of the adoption proceedings is incidentally involved. In such proceedings the moral, intellectual and material welfare of the child are the matters of chief importance, Bourn v. Hinsey, 134 Fla. 404, 183 So. 614, and the infant should be placed where its interest will be best subserved, without regard to the validity or invalidity of the adoption proceedings.

Of course, all things being equal, the legal right of the father will generally prevail. But the rights of the parent are not absolute; many other factors must be taken into consideration. 'The ties of nature and of association, the character of the applicant for the child, its age, health, and sex, the moral or immoral surroundings of its life, the benefits of education and development, and pecuniary prospects, as well as many other considerations, enter into the judicial determination.' Marshall v. Reams, 32 Fla. 499, 14 So. 95, 96, 37 Am.St. Rept. 118 (13 So.2d at 209)

* * *

From a critical study of the testimony in the case, we have no hesitancy in arriving at the conclusion that the moral, intellectual, and material welfare of the child will be best subserved by allowing it to remain with the foster parents. (13 So.2d at 210)

The doctrine of *Fielding v. Highsmith* was of course applied in the controlling *Arnd't* case. *Fielding* shows that where, as here, for some technical reason, a potential adoption fails, nevertheless custody does not automatically revert to the natural parent. To the contrary the best interest of the child is paramount.[4]

Manifestly, the case and its legal doctrine required affirmance here — because here, as in *Fielding*, the infant's interest will be best subserved.

---

[4]Also, in FIELDING, the would-be adoptive parents had another child—just like the DeMartinos do here. The relationship between that child and the child involved was referred to in the court's opinion.

Remarkably, there is yet even a closer case. In *McKinney v. Weeks*, Fla.App. 1961, 130 So.2d 810, cited below, the infant, like Lenore, was born out of wedlock. As here, the mother filed a habeas corpus proceeding in Florida notwithstanding her prior execution of the consent to adoption. The respondents, like the DeMartinos, were husband and wife, and apparent complete strangers to the blood. They gained custody of the infant *only three weeks prior to the commencement of the habeas corpus proceedings. And their identity was disclosed to the petitioner for the first time only upon the filing of the petition.*

The habeas corpus proceeding alleged, and the proof showed, that the consent was invalid under the law of Florida for technical reasons because it was not witnessed properly. The trial court entered judgment adverse to the mother, but the Second District Court of Appeal reversed because the consent was invalid. The court did not, however, automatically direct that custody be given to the mother. To the contrary, the court, citing the *Fielding* case and the *Arnd't* case, stated in language again controlling here as follows:

> Although a reversal must be entered herein, a remand for further proceedings is indicated. *Nowhere in the record before us does it appear that there was an inquiry into the child's welfare.*
>
> 'Where a writ of habeas corpus is prosecuted for the purpose of determining the right to the custody of a child, the controversy does not involve the question of personal freedom, because an infant, for humane and obvious reasons, is pre-

sumed to be in the custody of someone until it has obtained its majority. The court, in passing on the writ in a case involving the custody of a child, deals with a matter of an equitable nature; it is not bound by any mere legal right of parent or guardian, but is to give either parent's claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the court's view of the best interest of those whose welfare required that they be in custody of one person or another. Hence, a court is not bound to deliver the child to any claimant, but should leave it in such custody as the welfare of the child at the time appears to require. In short, although the natural rights of the parents are entitled to due consideration, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents.'

15 Fla.Jur., Habeas Corpus §62. Reference is also made to Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208, whereupon habeas corpus an order of adoption was found invalid, and to Arnd't v. Prose, Fla. 1957, 94 So.2d 818, where evidence was refused by trial judge on the question of the welfare of the child.

A closer analogy between cases could not exist than the analogy between *McKinney* and this case. The failure of the consent of itself simply does not mean that the

mother is entitled to custody. Rather a full adversary hearing on the best interests of the child is required. That hearing has been had, and there can be little doubt where those interests best rest.

Another case virtually controlling here and almost exactly like it, is *Robertson v. Bass*, 52 Fla. 420, 42 So. 243, cited below. See also *Day v. Nelson*, Fla.App. 1968, 213 So.2d 491, and see *State ex rel. Weaver v. Hamans*, 1935, 118 Fla. 230, 159 So. 31 (and cases cited); *State ex rel. Hicks v. Cain*, 1948, 160 Fla. 680, 36 So.2d 275; see also *Witt v. Burford*, 84 Fla. 204, 93 So. 186; *Hancock v. Dupree*, 100 Fla. 617, 129 So. 822 (welfare of child governs in child-custody habeas corpus proceeding, and not technical legal right to custody); *Crane v. Hayes*, Fla. 1971, 253 So.2d 435, 440 (parent's right subordinate to child's welfare).

In a similar case, *State ex rel. Weaver v. Hamans*, supra, 159 So. 31, a mother had voluntarily turned over one of her children to foster parents—at least until the child finished her education. Affirming a remand of custody to the foster parents, on a second petition for habeas corpus the Florida Supreme Court—again in language directly applicable here, quoted the trial court's findings and said:

> Further in the judgment the court says:
>
> 'This is a sad case and a case which this court would much prefer not to be called on to decide. I doubt if even the wisdom of Solomon himself could settle this problem, because I have no doubt that both the respondents and the petitioner love

the child. Of course there were many considerations from all of the evidence, introduced in the previous trial which entered into the Court's judgment remanding the child to the custody of the respondents. I cannot but conclude, in view of all of the evidence and my observation of the parties, both in and out of the court room, and my observation of the child in the court room, and the actions of the child with reference to the petitioner and the respondents, and of the actions of the parties towards and with reference to the child, that in spite of the fact that the petitioner loves the child with a mother's love, having been separated from the child more than two years, she cannot and would not be hurt as much by allowing the original judgment in this cause to stand as would the respondents. *I have no doubt that the respondents are more closely attached to the child at this stage than is the petitioner, and, of course, the child is completely attached to the respondents, and it seems to me that while it is a bad situation either way, and the Court realizes that the mother loves the child and would like to have it with the other children, that nevertheless in view of all the circumstances, it would be a far greater tragedy to society and to the parties involved, and especially to the child and the respondents, to take the child away from them and award it to the petitioner than it would be to leave the child where she is.* From a humane standpoint, the court is convinced that the lapse of the additional year has greatly increased the necessity for leaving the child with the respondents to avoid the greatest tragedy. *My disposition, under ordinary*

circumstances, as is the disposition of all courts, is to leave the child with its mother or father, but the circumstances of this case are such that I cannot bring myself to the conclusion that I could or would take the child from the respondents, under all the circumstances of this case, and particularly when I consider the judgment which this court heretofore entered in a proper and complete trial of this cause on the merits, at which time the court carefully went into the whole matter and definitely decided the case.'

The evidence disclosed by the record abundantly sustains the conclusions reached by the trial judge, and following the rule which we enunciated in the case of Witt et al. v. Burford, supra, and Hancock v. Dupree, supra, we must affirm the judgment. It is so ordered.

Affirmed. (159 So. at 33)

As in *Hamans*, there can be no doubt where Baby Lenore's best interest rests.

The evidence construed in the light most favorable to the DeMartinos—as it must in a child custody case at this stage of the proceedings (see *Mirras v. Mirras*, Fla.App. 1967, 202 So.2d 887, 893; *State ex rel. Weaver v. Hamans*, supra, 159 So. at 33), was more than sufficient to support the determination.

The psychiatric and expert testimony alone shows the damage a transfer would inflict. See, *Painter v. Bannister*, supra. The baby—on top of the problems attendant to a transfer from the only parents it has ever known, would

be brought up on a New York apartment, basically by a 65 year old non-English speaking maid; without a father, or sister, or all around family situation. Olga Scarpetta—for whom we feel deep sympathy—created her own problems. The baby must not suffer for them. The *baby* is the consideration—as is her welfare.

The cases cited by the petitioner are inopposite: *In re Vermuelen's Petition*, Fla.App. 1959, 114 So.2d 192, merely holds that where one parent unlawfully and unilaterally takes a child and places it with others, against the will of the remaining fit and competent parent, the remaining parent does not have to vie for custody of the child on an equal footing with strangers. A primary consideration in *Vermuelen* was the court's determination that:

> We cannot close our eyes, however, to the grave injustice which has been done appellant where through no fault of his own he . . . has been deprived of living together in the family relationship . . .

Even that case recognizes the overriding consideration—the baby's welfare.

The case has nothing to do with this one, where Olga Scarpetta voluntarily surrendered her child; and where technical legal custody in the DeMartinos resulting from that consent lawfully continued until at least May of 1971, even under the New York law—which is not binding here—when the stays ended. Those stays, of course, were not even sought by the non-party respondents. And at their expiration, the child already was almost a year old and well into the critical non-transfer period. In the light of

Arnd't, supra; *Fielding*, supra; *McKinney*, supra; and *Hamans*, supra; a factual comparison between *Vermeules* and this case is like a comparison between apples and airplanes.

Where a surrender or abandonment is voluntary and unqualified in its inception, all of the cases teach us that the natural right of the parent no longer is absolute. *No one says that it is not entitled to substantial consideration*, which the courts below did not dispute, but it is subordinate to the child's best welfare. Custody then depends primarily upon the child's best welfare even in a suit between the surrendering parent and strangers who have obtained lawful custody in the interim—although the rights of the natural parent must be given due consideration. This is just such a case; and on all the evidence and logic and common sense as well, custody was awarded to the DeMartinos. No violation of due process exists.

3. *Claim of Violation of Due Process Clause Not Raised Below.*

Pages 11-12 of the Petition purport to show preservation of a claim of deprivation of due process in the trial court. Yet a simple reading of the matter to which reference is made shows not a *hint* of such a contention.

Nor is it even claimed, nor can it be, that *any* due process point was asserted on appeal at any stage thereafter. A clearer case of waiver of a constitutional point by failure to raise it in the State Appellate Court could not exist. *Robertson & Kirkham*, supra [1951 Ed.] §70, and cases cited.

III. WRIT OF CERTIORARI SHOULD NOT BE GRANTED WHERE NO SPECIAL REASONS AS CONTEMPLATED BY RULE 19 EXIST, AND THE MATTER INVOLVES ONLY A DETERMINATION OF CHILD'S BEST WELFARE ON UNIQUE FACTS, ON AN EXTENSIVE RECORD, IN A UNIQUE "EPISODIC" CASE.

The decisions below do not decide a federal or constitutional question properly preserved; nor pass on a federal or constitutional question not previously determined by this court, nor in a manner probably not in accord with applicable decisions of this Court. None of the indicia for the granting of a writ, as contemplated by Rule 19, of the Rules of the Supreme Court of the United States, are present.

There is a mass of documentary evidence and testimony supporting the Florida decree. The determination lawfully was made after a full adversary proceeding. The decree was properly affirmed. The petitioner here seeks in reality, only to "review evidence and discuss specific facts," and to challenge a finding on a unique factual record, *United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496-97 (1925), in the guise of this Petition for a Writ of Certiorari. To warrant Rule 19 attention, the issues must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

This simply is not a case where certiorari is warranted or required. It is a unique case, involving a unique set of

circumstances. The law is settled both procedurally and substantively in matters of this kind. Finally the constitutional issues advanced are without merit and were not properly preserved anyhow.

The best welfare of "Baby Lenore" has been determined. It would be a travesty now, after the passage of so much time, to wrest the child away from the only family and parents she has ever known.

VI

CONCLUSION

No reason has been shown to grant the writ here sought. The petition for a writ of certiorari should be denied.

Respectfully submitted,

BILL COLSON
Attorney for Respondents

ROBERT ORSECK, *of Counsel*

COLSON & HICKS, P.A.
Second Floor, Concord Building
Miami, Florida 33130

PODHURST ORSECK
& PARKS, P.A.
Second Floor Concord Building
Miami, Florida 33130

FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York

of Counsel

VII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this ____ day of October, 1972, three copies of this Brief of Respondents were mailed, postage prepaid to the following attorneys of record:

ZALK RUBEL & PERRET
608 Fifth Avenue
New York, New York

ROSENBLATT and ROEMER, P.A.
HORTON SCHWARTZ & PERSE
66 W. Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

I FURTHER CERTIFY that all parties required to be served have been served.

BILL COLSON
Attorney for Respondents

ROBERT ORSECK, *of Counsel*
COLSON & HICKS, P.A.
Second Floor, Concord Building
Miami, Florida 33130

PODHURST ORSECK
& PARKS, P.A.
Second Floor, Concord Building
Miami, Florida 33130

FUCHSBERG & FUCHSBERG
250 Broadway
New York, New York

of Counsel